IN THE

Supreme Court of the United States

October Term 1946

No. 364

SILESIAN AMERICAN CORPORATION, Debtor
and SILESIAN HOLDING COMPANY,
Petitioners,

against

JAMES E. MARKHAM, Alien Property Custodian,
Respondent.

PETITION FOR REHEARING

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To the Honorable Fred. M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully request reconsideration of their petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, which this Court denied on October 14th, 1946.

Preliminary Statement

The decision which the petitioners seek to have reviewed has to do with the construction placed upon Section 5(b) of the Trading With the Enemy Act, as amended, in an opinion by Judge Learned Hand.

Reasons for Requesting Rehearing

(1) Since the decision of the Circuit Court of Appeals for the Second Circuit was handed down on July 3rd, 1946, the Judiciary Committee of the Senate, having before it a copy of Judge Learned Hand's opinion in the case at bar has expressly placed a construction on §5(b) of the Trading With the Enemy Act as amended that is in conflict with that set forth in the opinion of Judge Learned Hand, and both houses of Congress have accepted and acted upon the construction of §5(b) as so declared by the Judiciary Committee of the Senate.

(2) Since the denial of petitioners' application the Court of Appeals for the District of Columbia has handed down a decision in the case of *Uebersee Finanz Korporation* v. *Markham* with an opinion construing §5(b) as amended which is in conflict with the opinion of Judge Learned Hand of the Circuit Court of Appeals for the Second Circuit in the case at bar.

1. The Conflict With the Judiciary Committee of the Senate

In December 1945 H. R. 5089 was introduced by Representative Sumners, Chairman of the House Committee on the Judiciary, for consideration by the Second Session of the 79th Congress. Apparently from comments made during the hearings, the bill was prepared in the Office of the Alien Property Custodian.

§33 of H. R. 5089 contained *inter alia* the following provisions:

> "Sec. 33. (a) A foreign country or national thereof within the meaning of section 5(b) hereof may not institute, prosecute, or further maintain a

suit pursuant to section 9(a) hereof in respect of any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof.

"(b) Notwithstanding the provisions of section 7(c) hereof, suit may be instituted by any person not an enemy or ally of enemy against the United States in the Court of Claims for just compensation in respect of any property or interest taken from the plaintiff and vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), but the complaint in such suit shall be dismissed on the merits unless the plaintiff establishes that he is a person entitled to just compensation by virtue of the last clause of the fifth amendment to the Constitution of the United States."

Hearings were held on the bill before a sub-committee of the House Committee on the Judiciary in February and May, 1946. Prior to the hearings and under date of February 4th, 1946, Mr. Byrnes as Secretary of State, addressed a letter to the Chairman of the House Committee on the Judiciary in which he objected to subdivision (b) quoted above on the ground that its effect was to deny to a friendly alien the right to obtain a return of his property and to substitute only such rights for just compensation as are granted by the Fifth Amendment, as to which he stated that the Department of Justice claims that a friendly alien does not have any rights under the Fifth Amendment to just compensation. Mr. Byrnes declared that the clause carried a grave threat to the rights of American nationals in foreign countries, and if the position of the Department of Justice is correct, would relegate friendly aliens to a

position of being without remedy for the seizure of their property except for Mr. Markham's suggestion that these rights be handled by diplomatic representations, to which suggestion the Department of State strongly objected both on principle and on grounds of enlightened self-interest. The full text of Mr. Byrnes' letter is set forth in full in the report of the hearings (*Hearings Before Sub-Committee No. I of the Committee on the Judiciary, H. R., 79th Cong. 2d Sess., on H. R. 5089*, pp. 28-29).

As a result of this objection, representatives from the offices of the Alien Property Custodian, the Attorney General and the Secretary of State seemed to have gotten together and prepared an amendment to §33 of the bill designed to overcome the objection of the Secretary of State by omitting the reference to the Fifth Amendment in subdivision (b) and substituting in place thereof a very complicated method for determining who would be entitled to sue in the Court of Claims and the conditions under which such suits should be prosecuted. Subdivision (a) was substantially retained. The bill as so amended is set forth in the report of the hearings, before the sub-committee (*supra*) at pp. 43 *seq.*

Various persons appeared before the House sub-committee for and against this bill and in the course of the hearings Representative Celler in response to the statement that the Constitution is not suspended during the time of war remarked (*House Hearings*, p. 78), "Let us be realistic. It (the Constitution) is certainly put in cold storage during the war * * *".

On June 26th, 1946 Representative Sumners introduced the bill in its amended form as H. R. 6890. The following

day the Committee on the Judiciary favorably reported the bill as so amended (*House Report No. 2398, 79th Cong. 2d Ses.*).

In the bill as so reported subdivision (a) of §33 remained substantially the same as above quoted and subdivision (b) was entirely rewritten so as to provide that notwithstanding the provisions of §7(c) a person whose property had been taken by the Alien Property Custodian could proceed in the Court of Claims for just compensation upon complying with numerous conditions in the bill set forth (*House Report*, pp. 23 *seq.*).

About the same time a bill identical with H. R. 6890 was introduced in the Senate as S. 2378. At the Senate hearings which were held in July 1946 a number of persons appeared in opposition to §33 (*Hearings Before a Sub-Committee of the Committee on the Judiciary, U. S. Senate, 79th Con., 2d Ses. on S-2378*). It was urged that the bill repealed existing law which permitted friendly aliens to recover their seized property under the provisions of §9(a) (*Senate Hearings*, pp. 40, 84); that the denial to a foreign country or national thereof of the right to proceed under §9(a) was unconstitutional as lacking due process (*Senate Hearings*, pp. 40, 58 *seq.*); that it would discriminate against friendly aliens (*Senate Hearings*, pp. 68, 89) and violate treaties of friendship (*Senate Hearings*, p. 42); that it would produce a hostile feeling among foreign nations and bring about retaliation (*Senate Hearings*, p. 62); that it would invite a repetition of policies of expropriation such as occurred in Mexico some years ago (*Senate Hearings*, p. 64); and that the enactment of such a section would cause a great deal of harm and detriment

from the public relations and advertising point of view in our efforts to promote foreign trade (*Senate Hearings*, p. 87).

For the purpose of meeting these arguments, representatives of the Alien Property Custodian and the Attorney General claimed that the effect of the amendments to §5(b) by the First War Powers Act, 1941, was to modify §9(a) so as to deny to friendly aliens the rights which they previously enjoyed (*Senate Hearings*, pp. 97 and 98) and in support of this contention, the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar (*Silesian-American Corporation* v. *Markham*) was cited, and a copy of the opinion by Judge Learned Hand was placed in the record (*Senate Hearings*, p. 99). In taking this position neither the representative of the Alien Property Custodian nor the Attorney General attempted to explain, and the Committee did not attempt to ascertain, why the proposed §33 was desirable, if as they alleged, the same effect had already been achieved by the amendments to §5(b) in 1941.

In making its report on S. 2378 (H. R. 6890) the Senate Committee on the Judiciary (*Senate Report No. 1839, 79th Cong. 2d Sess.*) struck out §33 entirely. In doing this, of course, they eliminated the provisions which denied to friendly foreign countries and the nationals thereof the right to recover seized property under §9(a) of the Trading With the Enemy Act, and also the provision that notwithstanding §7(c) of that Act, just compensation could be obtained by a suit in the United States Court of Claims. In explaining this deletion the Committee said (*Report*, p. 2):

"* * * The purpose of this amendment is to eliminate the proposals to cut off the right of a friendly foreign national to sue for and obtain the return of his property under Section 9(a). *The bill as thus amended preserves in full these rights under 9(a) which the friendly foreign national, together with United States citizens has had for more than 25 years under the act.*" (Italics supplied.)

The report of its Judiciary Committee was filed in the Senate on July 26th, and on the same day Representative Celler submitted to the House a copy of the bill as reported in the Senate and asked for a suspension of the rules so that the revised bill could be voted upon (92 *Cong. Rec.* 10346).

In the discussion which attended the passage of the bill the elimination of §33 was referred to and Representative Philbin inquired (92 *Cong. Rec.* A. 4805):

"If Section 33 is eliminated from this bill, then the law as then written would give to foreign friendly nationals the right to be sued and to sue in our courts and have their rights adjudicated?"

To this inquiry Representative Celler replied:

"I may say to the gentleman that the elimination of Section 33 gives the right to a foreign national to sue for the return of his property, either in law or in equity. That does not apply to an enemy alien, only to a friendly foreign national. *That right remains unchanged if we eliminate Section 33.*" (Italics supplied.)

The rules were thereupon suspended by a two-thirds vote and the bill passed by the House.

The bill so passed by the House was brought up in the Senate on July 29th and passed with four minor amendments not included in the report of its Judiciary Committee (92 *Cong. Rec.* 10515). These amendments made from the floor of the Senate, required that the bill again go before the House, and the additional amendments were concurred in by the House on July 30th, 1946 (92 *Cong. Rec.* 10627).

It will thus be seen that the opinion of Judge Learned Hand in the case at bar was submitted to the Senate Committee on the Judiciary as authority for the proposition that the effect of the amendments to §5(b) contained in the First War Powers Act, 1941, was to deprive friendly aliens of the right to recover in a proceeding under §9(a) property vested by the Alien Property Custodian and to relegate them to a suit in the United States Court of Claims to recover just compensation. With this opinion before them the Senate Committee on the Judiciary nevertheless expressly stated that by eliminating provisions designed to conform the statute with the construction placed upon §5(b) by Judge Learned Hand, it was the purpose of the Committee to preserve in full those rights under §9(a) which friendly foreign nationals, together with United States citizens, had had for more than 25 years.

The result is a distinct and sharp conflict between the effect of §5(b) as amended as construed by Judge Learned Hand and as understood by the Judiciary Committee of the Senate.

In passing the bill both the House of Representatives and the Senate acquiesced in the interpretation of the

statute declared by the Judiciary Committee of the Senate, and a serious question has thereby been raised as to the significance which should be attached to the opinion of Judge Learned Hand. This question can only be resolved by having the matter reviewed in this Court.

While it is true that the opinion expressed by the Judiciary Committee of the Senate and acquiesced in by both houses of Congress was addressed to §9(a), and the case now at bar has to do with §8(a), the wording of the two sections so far as they affect the rights of friendly aliens are identical, and if in §9(a) the meaning of the words "any person not an enemy or ally of enemy" was not changed by the amendments to §5(b), it necessarily follows that no change was made in the meaning of the same words in §8(a), and if under §9(a) a friendly alien may still sue to recover possession of vested property, then, under §8(a) a friendly alien may retain possession of property held by such friendly aliens as pledgees.

2. The Conflict With the Decision of the Court of Appeals for the District of Columbia

Since the denial of petitioners' application the Court of Appeals for the District of Columbia has handed down a decision in the case of *Uebersee Finanz Korporation* v. *Markham* which is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case at bar.

In the opinion of Judge Learned Hand below, he stated in effect that a friendly alien could not under the provisions of §9(a) recover property that had been vested by the Custodian, but was required to seek just compensation on an

implied promise in the Court of Claims (R. 66-67)[1]. Aside from constitutional considerations, this conclusion as to the effect of §5(b) upon §9(a) was necessary for the purpose of determining the effect of §5(b) on §8(a), because the pertinent wording of §8(a) was identical with the wording of §9(a). The difference between the two sections was the fact that §8(a) authorized a non-enemy pledgee to retain possession of enemy property against seizure by the Custodian whereas §9(a) authorized a non-enemy owner to recover property which the Custodian had seized.

In arguing before the Circuit Court for the construction adopted by Judge Learned Hand the Custodian laid great emphasis upon the decision by the District Court in the *Uebersee Finanz Korporation* case and the several other unreported District Court cases said to have applied a similar construction. The several cases on which the Custodian relied are set forth at page 5 of the respondent's brief in this Court.

The Court of Appeals for the District of Columbia on October 21st, 1946 (since the denial of the petition herein), reversed the decision of the District Court, and held that §5(b) as amended should not be construed as preventing a friendly alien from recovering possession of vested property under the provisions of §9(a). The prevailing and dissenting opinions have not yet been reported and copies thereof are set forth in the Appendix hereto.

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[1] In Judge Hand's opinion it was said (R. 67) that "It so chances that both the debtor and the Custodian take the position that a friendly alien may not sue under §9(a)". This statement was erroneous and apparently due to a misapprehension of the petitioners' argument, which had been that *if* the construction placed upon §5(b) by the Custodian were correct, a friendly alien could not sue to recover vested property.

As to the effect of §5(b) as amended on §9(a) the prevailing opinion states (*infra*, p. 19):

> "* * * In any event, to sustain the Custodian's position not only would require a major job of statutory reconstruction, but would also—as to the property of friendly aliens—raise grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do. See *Becker Steel Co.* v. *Cummings*, 296 U. S. 74; *Stoehr* v. *Wallace*, 255 U. S. 239; *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554. In our view, what was said by the Supreme Court in the recent case of *Markham* v. *Cabell*, 326 U. S. 404, is conclusive against such action. In that case, as in this, the Custodian contended that the amendment to §5(b) armed the Executive with far more comprehensive powers over enemy property and the property of other foreign interests, including friendly and allied interests, than in World War I, and that the effect of this was to withdraw the right to sue explicitly granted by §9(a) of the Act. But the Court rejected this claim, and expressly held that the right to sue granted by §9(a) should not be read out of the law.
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> "We have found nothing and reason suggests nothing to indicate that the dominant purpose of the Act—the elimination of enemy influence in our economy—has been changed, or that the calamity of war was to be used to eliminate and destroy *all* alien investment in the United States. Certainly, it cannot be urged that Congress intended to jeopardize, without adequate remedy, the billions of dollars of allied and friendly nations' property merely because of its temporary presence in this country in time of war, and the purpose in the enlargement of §5(b) must necessarily have been to reach with confiscation only that portion tainted with an enemy interest.

> "And that this is true is definitely shown, we think, in the fact that Congress has twice refused to write the Custodian's present construction into the law. But even if that conjecture be dismissed, there is nothing to support the theory of the Custodian that the new legislation eliminated all remedy as to all foreign rights. For obviously, such a purpose would run headlong into constitutional objections."

If such is the effect of §5(b) as amended on §9(a), it would not be logical to conclude that §5(b) as amended has a different effect on §8(a). If despite the provisions of §5(b) as amended a friendly alien may recover from the Custodian property vested under §9(a), a friendly alien under §8(a) may likewise retain the possession of property held as a pledgee. In his opinion Judge Hand conceded that such would be the result, when he said (R., p. 67):

> "* * * It is true that in the original Act, §8(a) protected a pledgee who was a friendly alien just as it protected a citizen pledgee; and, for argument, we will assume that it forbade disturbing the possession of any pledgee who was not himself an enemy or an ally of enemy."

If the prevailing opinion of the Court of Appeals in the *Uebersee* case correctly construed the effect to be given to §5(b) as amended, then §8(a) withheld from the Custodian any power to take possession of pledged property held by friendly aliens and any vesting order issued by the Custodian in an attempt to do so was obviously wrongfully issued and invalid.

It is therefore evident that the conflict between the Circuit Court of Appeals for the Second Circuit and the Court of Appeals for the District of Columbia as to the construction to be placed on §5(b) as amended is a conflict of basic

importance in the case at bar, and if the decision of the Court of Appeals in the *Uebersee* case, reflecting as it does the opinion of Congress, correctly construed §5(b), it necessarily follows that the decision of the Circuit Court in the case at bar should be reversed.

Conclusion

The existing conflict between the opinion expressed by Judge Learned Hand in the Court below and the opinion expressed by the Judiciary Committee of the Senate and acquiesced in by both houses of Congress, together with the conflict between Judge Hand's opinion and that of Chief Justice Groner of the Court of Appeals for the District of Columbia make it absolutely essential that this Court should review the decision herein of the Second Circuit and determine which of these eminent authorities has correctly interpreted the law.

Wherefore petitioners respectfully urge that a rehearing of their petition for a writ of certiorari be granted and that upon further consideration the order of October 14th, 1946, denying the petition for certiorari be revoked, that the writ of certiorari issue, and that the petitioners have such other further and different relief as to this Court may seem just.

Respectfully submitted,

GEORGE W. WHITESIDE,
Counsel for petitioners, Silesian-American Corporation, Debtor, and Silesian Holding Company.

LEONARD P. MOORE,
WILLIAM GILLIGAN,
Of Counsel.

Certificate

I, GEORGE W. WHITESIDE, counsel for the above named petitioners, Silesian-American Corporation, Debtor, and Silesian Holding Company, do hereby certify that the foregoing petition for a rehearing of this case is presented in good faith and not for delay.

GEORGE W. WHITESIDE,
Counsel.

Appendix

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA

No. 9187.

UEBERSEE FINANZ-KORPORATION, A. G., APPELLANT,

v.

JAMES E. MARKHAM, as Alien Property Custodian, APPELLEE.

Appeal from the District Court of the United States for the District of Columbia.

Argued May 28, 1946. Decided October 21, 1946.

Mr. Richard J. Connor, with whom *Mr. Bart W. Butler* was on the brief, for appellant.

Mr. Herbert Wechsler, Special Assistant to the Attorney General, with whom *Mr. Harry LeRoy Jones*, Special Assistant to the Attorney General, was on the brief, for appellee. *Mr. Wallace H. Walker*, Department of Justice, also entered an appearance for appellee.

Before GRONER, C. J., and EDGERTON and PRETTYMAN, JJ.

GRONER, C. J.: The decision in this case turns upon the question whether the amendment of §5(b) of the Trading with the Enemy Act by Title III of the First War Powers Act of 1941 has, by necessary implication, the effect of nullifying and rendering impotent §9(a) of the original

Act.[1] Or, stated more concisely, whether the amendment of §5(b) in 1941, of itself and without more, renders inoperative the rights conferred under §9(a) of the original Act.

Appellant is a corporate national of Switzerland and at the outbreak of World War II was the owner of certificates of stock in sundry American corporations. The Alien Property Custodian, under authority of amended §5(b) and under Executive Orders 9095 and 9193, seized appellant's property as the property of a "foreign country or national thereof" and vested the same in himself. Since precisely this procedure is authorized under that section, obviously no exception can be had to this. But at that point appellant, claiming the right to recover the vested property under the provisions of §9(a) of the Act, brought this suit, alleging, among other things, that before and at

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[1] 50 U. S. C. War App. §9(a), 41 Stat. 977, provides: "Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property * * * conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him * * * may institute a suit in equity * * * in the district court of the United States * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian * * * or the interest therein to which the court shall determine said claimant is entitled."

50 U. S. C. Supp. V, War App., §616, 55 Stat. 839, 840, amending §5(b) of the Trading with the Enemy Act, provides: "During the time of war * * * any property or interest of *any foreign country or national thereof* shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe, such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, * * *." (Italics supplied.)

the time of the seizure it was a citizen of Switzerland; that it was not an enemy or ally of enemy; that is was not a "national of a designated enemy country"; and that the property was not then nor at any other time held for the benefit of an enemy or ally of enemy, nor for the benefit of a "national of a designated enemy country."

The Custodian filed a motion to dismiss on the ground that the complaint failed to state a valid cause of action, and the District Court, without opinion, granted the motion. From that action this appeal is taken.

The basis of the motion to dismiss is that it appears on the face of the complaint that appellant is a national of a foreign country and, this being conceded, the Custodian insisted and now insists that under the amended §5(b) the vesting is absolute and not subject to attack.[1a] To avoid conflict with the constitutional prohibition against the tak-

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[1a] The language of amended §5(b) as to vesting is—"Such interest or property shall be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States." And the position of the Custodian is that this language vests the property in the Custodian unqualifiedly and completely. The language used is broad, but it is no broader than the language used in the vesting provision of the original Act (Act of March 28, 1918, amending §12 c. 28, 40 Stat. at L. 459-460), wherein the Custodian was given the power to sell and manage such property as though he were the absolute owner. But on a similar claim under that provision the Supreme Court, in Central Union Trust Co. v. Garvan, *infra*, said:

> "All this may be conceded if no claim is filed. But this act did not repeal §9, which is amended by the later Acts of July 11, 1919, chap. 6, 41 Stat. at L. 35, and of June 5, 1920, chap. 241, 41 Stat. at L. 977, and, as we have said, provides for immediate claim and suit, and requires the property in cases of suit to be retained in the custody of the Alien Property Custodian or in the Treasury of the United States to abide the result."

ing of property of friendly aliens without just compensation, which such a construction would raise, the Custodian suggests that appellant may obtain just compensation by way of suit against the United States in the Court of Claims. But that suggestion conflicts with §7(c) of the Act,[2] which provides—"The sole relief and remedy of any person having any claim to any money or other property * * * transferred * * * to the Alien Property Custodian * * * shall be that provided by the terms of this Act," i. e., §9(a). Thus appellant's right of recovery, if it has any, is limited by statutory terms to a suit under §9(a), for only to that extent and in that manner has the United States consented to be sued. *Pflueger* v. *United States*, 73 App. D. C. 364, 121 F. (2d) 732, *cert. den.* 314 U. S. 617; *Sigg-Fehr* v. *White*, 52 App. D. C. 215, 285 Fed. 949.

It will thus be seen that the Custodian's position is not only that the vesting of the property is within the authority delegated to him—which is not denied—but also that §9(a) of the Act, which specifically confers jurisdiction on the several district courts to entertain a proceeding to inquire into the question whether the seized property is owned by "an enemy or ally of enemy," and if not so owned, to order its return, is, since the passage of the amendment to §5(b), inapplicable in the case of property owned by any foreign national which has been seized by the Custodian.

The Custodian attempts to avoid the stark obliteration from §9(a) of the words "Any person not an enemy or ally of enemy", by saying that that section limits recovery to "the interest therein" of the claimant, and accordingly

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[2] 50 U. S. C. War App. §7(c).

the Custodian insists there may be no recovery here because seizure under amended §5(b) destroys all interests of all aliens in seized property. But there is nothing in §5(b) to sustain this view and to adopt it would read into that section words that are not there and at the same time, and with just as little warrant, read out the quoted words from §9(a). This assumes, we think, too much. In any event, to sustain the Custodian's position not only would require a major job of statutory reconstruction, but would also—as to the property of friendly aliens—raise grave doubts as to the constitutionality of the law. And this, of course, it is not permissible to do. See *Becker Steel Co.* v. *Cummings*, 296 U. S. 74; *Stoehr* v. *Wallace*, 255 U. S. 239; *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554. In our view, what was said by the Supreme Court in the recent case of *Markham* v. *Cabell*, 326 U. S. 404, is conclusive against such action. In that case, as in this, the Custodian contended that the amendment to §5(b) armed the Executive with far more comprehensive powers over enemy property and the property of other foreign interests, including friendly and allied interests, than in World War I, and that the effect of this was to withdraw the right to sue explicitly granted by §9(a) of the Act. But the Court rejected this claim, and expressly held that the right to sue granted by §9(a) should not be read out of the law. The Supreme Court said:[3] "We can find no indication in the 1941 legislation that Congress by amending §5(b) desired to delete or wholly nullify §3(a). On the contrary, the normal assumption is that where Congress amends only one section of a law, leaving another untouched, the two were designed to function as parts of an integrated whole."

[3] 326 U. S. 404-411.

Read as we read them, §5(b) as amended and §9(a) do not conflict, but rather constitute a reasonable program to meet the emergency of war. Under the Act as it was in World War I, the seizure of alien property was limited to that of enemies, and the seizure was "after investigation." Thus, a determination of enemy ownership was a prerequisite to seizure.[4] A more expeditious procedure to assure quick protection of our economy against enemy influence was to seize initially *all* alien property, and then upon investigation and with the burden of producing the facts placed upon the claimant rather than upon the Custodian, to return the property of aliens not enemies. Amended §5(b) and §9(a), when read together, prescribe exactly that procedure. The amendment of §5(b) did not nullify §9(a), nor was it inconsistent therewith. Indeed, it seems to us that the haste imposed by war required additional assurance against unwarranted seizure.

We have found nothing and reason suggests nothing to indicate that the dominant purpose of the Act—the elimination of enemy influence in our economy—has been changed, or that the calamity of war was to be used to eliminate and destroy *all* alien investment in the United States. Certainly, it cannot be urged that Congress intended to jeopardize, without adequate remedy, the billions of dollars of allied and friendly nations' property merely because of its temporary presence in this country in time of war, and the purpose in the enlargement of §5(b) must necessarily have been to reach with confiscation only that portion tainted with an enemy interest. And that this is

[4] The Custodian says that a summary determination was sufficient. Whether summary or not, the statute made the investigation a preliminary and not a subsequent step to seizure.

true is definitely shown, we think, in the fact that Congress has twice refused to write the Custodian's present construction into the law.[5] But even if that conjecture be dismissed, there is nothing to support the theory of the Custodian that the new legislation eliminated all remedy as to all foreign rights. For obviously, such a purpose would run headlong into constitutional objections.

Accordingly, it seems to us quite clear that neither the language of the amendments nor the policy of Congress, as shown by the revised legislation, contemplated the position taken by the Custodian here. It follows, therefore, that the judgment below must be reversed and the case remanded for trial in accordance with the views expressed in this opinion.

Reversed and Remanded.

EDGERTON, J., *dissenting*: Section 9(a) still gives a remedy, as it always did, against unauthorized takings of property. But taking the property of a friendly alien is now expressly authorized by §5(b). As the court concedes, the property in suit "vested" in the Custodian. The vesting for which §5(b) provides is unqualified and complete. The property may be "used, . . . sold, or otherwise dealt with" by the Custodian. This precludes retention by appellant of any interest in the property.

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[5] H. R. 4840, 78th Cong. 2nd Sess. (died in Committee). H. R. 5089, 79th Cong. 2nd Sess. (reintroduced as H. R. 6890, 79th Cong. 2nd Sess.), contained in §33 provision that "a foreign * * * national * * * may not * * * maintain a suit pursuant to 9(a) hereof." This section, together with an identical section contained in S. 2378, 79th Cong. 2nd Sess., was deleted and the remainder of the bill was passed.

The policy of §5(b) is clear. Nominal ownership by nominal neutrals is often a front for, or otherwise equivalent to, enemy control. Such arrangements are often hard to detect and usually harder to prove. To defeat them, Congress authorized the Custodian to vest in himself the property of any foreign national. It does not appear that they can be defeated otherwise.*

I do not understand how §9(a) can be thought to give appellant a claim to recover property which is no longer his. The court states that §9(a) specifically confers jurisdiction to inquire whether seized property is owned by an enemy or ally of enemy, and if not so owned, to order its return. I cannot find this provision in §9(a). What this section, as I read it, specifically confers is jurisdiction to award to a claimant whose "interest" or "title" is "established . . . the . . . property . . . or the interest therein to which the court shall determine said claimant is entitled." Appellant has no interest or title in the property in suit, since the property is vested unqualifiedly in the Custodian.

Compensation for the taking of the property is a different matter. The Tucker Act, 28 U. S. §250, permits recovery in the Court of Claims on any claim "founded upon the Constitution of the United States or any law of Congress . . . [or] upon any contract, express or implied, with the Government of the United States . . ." And "it is settled by many decisions of which we need only cite the last—Yearsley v. Ross, 309 U. S. 18—that when the United States seizes the property of an individual, not an enemy, in pursuance of a public purpose, it impliedly prom-

* This paragraph did not appear in the original opinion but was added by Mr. Justice Edgerton on October 25th.

ises to pay just compensation, and that that promise is 'just compensation' under the Fifth Amendment." *Silesian-American Corp.* v. *Markham* (C. C. A. 2d; decided July 3, 1946). The former owner's claim to compensation is not affected by the provision in §7(c) that "the sole relief and remedy of any person having any claim to any money or other property . . . transferred" shall be that provided by the Act, since a claim to compensation for the taking of property is not a claim to the property. Accordingly I see no constitutional difficulty in the statutory scheme.

pp. 5-9-6

SUPREME COURT OF THE UNITED STATES

No. 6.—October Term, 1947.

Silesian American Corporation, Debtor, and Silesian Holding Company, Petitioners, v. Tom C. Clark, Attorney General, as Successor to the Alien Property Custodian.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[December 8, 1947.]

Mr. Justice Reed delivered the opinion of the Court.

The Alien Property Custodian on November 17, 1942, executed Vesting Order No. 370. This order was issued under the authority of the Trading with the Enemy Act, 40 Stat. 411, as amended, and Executive Order No. 9095, as amended, and in terms vested the property therein described in the Alien Property Custodian in the interest and for the benefit of the United States. The order found the property to belong to a national of Germany. The property covered by the order was two blocks of stock—one common, one preferred—in the Silesian American Corporation, a Delaware corporation, hereinafter called Silesian. The stock, prior to August 31, 1939, stood in the stock book of Silesian in the name of Non Ferrum Gesellschaft zur Finanzierung von Unternehmungen des Bergbaues und der Industrie der Nichteisenmetalle, Zurich, Switzerland, a Swiss corporation, hereinafter referred to as the Non Ferrum Company. Non Ferrum, it was determined by the Custodian's order, held the stock for the benefit of Bergwerksgeiellschaft Georg von Giesche's Erben, a German corporation. The certificates, it is asserted, had been deposited as security for loans with a group of banks, all of which apparently

were chartered by Switzerland and are hereinafter referred to as the Swiss Banks.[1]

To carry out the purpose of his vesting order, the Custodian directed Silesian to cancel on its books the outstanding Non Ferrum certificates, above referred to, and to issue in lieu thereof new certificates to the Custodian. This controversy revolves around the objection of Silesian so to act because the Custodian did not have physical possession of the pledged Non Ferrum certificates so as to be able to surrender them for cancellation, as the corporation's by-laws required. Silesian feared liability to the holders of the Non Ferrum certificates for issuing other certificates in such circumstances.

Silesian had been a debtor under Chapter X of the Bankruptcy Act since July 30, 1941. It therefore asked the Bankruptcy Court for instructions as to its compliance with the Custodian's direction. The other petitioner here, Silesian Holding Company, a Delaware corporation also, appeared and throughout has remained as a party to this litigation. It is the majority stockholder of Silesian but claims no different or other interest in the issue than Silesian. For the purpose of this case, it may and will be treated as having no more interest in the issue than Silesian has. The Swiss Banks asked the Reorganization Court to give instructions to the Debtor that no new shares be issued until the controversy between the Swiss Banks and the Custodian could be "fully, firmly and finally adjudicated." This prayer was based on a verified answer to Silesian's request for instruction, which answer alleged that the "Swiss Banks were the owners of the 'Non Ferrum' stock." The Swiss Banks notified Silesian that any issue of new certificates representing the Non Ferrum stock, with or without court direction, would be at Sile-

[1] They are Union Bank of Switzerland, LaRoche & Company, Banque Cantonale de Berne, and Aktiengesellschaft Leu & Company.

sian's risk. Affidavits supporting the objection of the Swiss Banks to instructions to Silesian to issue the new certificates to the Custodian were filed with the District Court. These affidavits declared the Non Ferrum stock was pledged, prior to 1938, to groups of Swiss banks. It is not clear whether they are the same institutions that are named in the answer of the Swiss Banks to the Debtor's request for instructions. For the purpose of this case, we assume that the groups are identical.

The District Court instructed the debtor to issue new certificates to the Alien Property Custodian. The court said:

> "The vesting order of the Custodian found that the stock was held for the benefit of an enemy. The statutory discharge from liability, § 5b or § 7e, [Trading with the Enemy Act] protects the debtor corporation and relieves it of doubt in the premises."

The court added:

> "Whatever may be the interests or rights of the Swiss banks, they cannot be considered here. Hearsay statements, unsupported by documents, allege that these banks are pledgees of the stock. These statements create no issue for our consideration. The banks are parties herein only to the extent that they have been recognized in the reorganization proceeding as possible owners of a claimed interest which they have never been called upon to prove. They are not here because of any action taken against them or any recognition given them by the Custodian or even by reason of any established interest in the stock."

No appeal to the Circuit Court of Appeals was taken by the Swiss Banks. They do not appear here as parties to this writ of certiorari or otherwise. We therefore express

no opinion as to the effect of the order and decision of the District Court upon the claims of the Swiss Banks as pledgees of the Non Ferrum stock. See *Silesian-American Corporation* v. *Markham*, 156 F. 2d 793, 795.

An appeal was taken to the Circuit Court of Appeals by Silesian. That court affirmed the order of the Bankruptcy Court. We first denied a petition for certiorari and then granted it so that this case might be considered in relation to other issues, thereafter presented here, in connection with the administration of the Trading with the Enemy Act. 329 U. S. 730 and 330 U. S. 852; *Clark* v. *Uebersee Finanz-Korporation*, 330 U. S. 813.

It was held by the Circuit Court of Appeals that Silesian had no "standing vicariously" to assert the interests of its shareholders. We agree. Silesian has no legal interest in the issue as to the ownership of its stock. It follows that Silesian has no standing to represent the interests of the pledgees of the Non Ferrum shares, if that is the present position of those shares. See *Anderson Nat. Bank* v. *Luckett*, 321 U. S. 233, 242. This reduces petitioners' objection to the order directing the issue of new certificates in favor of the Custodian for the Non Ferrum stock to the claim that the sections of the Trading with the Enemy Act under which the Custodian acted are invalid as applied to Silesian in these circumstances. If the provisions do not authorize the order and direction, Silesian, over its own objections, cannot be compelled to obey.

The Custodian vested the stock in himself by virtue of the Trading with the Enemy Act, as amended by the First War Powers Act of 1941, including, of course, § 5 (b) (1),[2] and Executive Order No. 9095, C. F. R. Cum. Supp. 1121,

[2] Trading with the Enemy Act, 40 Stat. 411, as amended by the First War Powers Act of 1941, 55 Stat. 839, § 5 (b) (1):

"During the time of war or during any other period of national emergency declared by the President, the President may, through

as amended 1174. This property was vested during war. There is no doubt but that under the war power,[3] as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property. *United States* v. *Chemical Foundation*, 272 U. S. 1, 11. Nor can there, we think, be any doubt that any property in this country of any alien may be summarily reduced to possession by the United States in furtherance of the war effort. Every resource within the ambit of sovereign power is subject to use for the national defense. This section was amended during war to cover the taking of alien property. It is limited to a war or a declared emergency period. While a natural hesitancy exists against so interpreting the war power clause as to

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any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

"(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; . . ."

[3] Art. 1, § 8, cl. 11.

expand its scope to cover incidents not intimately connected with war, we think reasonable preparation for the storm of war is a proper exercise of the war power. This seizure of alien property, in a time of emergency, is of that character. We need not consider whether the general welfare clause could be a source of congressional power over alien property.* This taking may be done as a means of avoiding the use of the property to draw earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of this government. Or the commandeered property of a friendly alien may be used to prosecute the war. The problems of compensation may await the judicial process. *Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 567–68. War brooks no delay. The Constitution imposes none.

The section, 5 (b) (1) (B), and Executive Order under which the Custodian acted authorized the vesting in him by his order of the property of a foreign national. This description covered stock ownership of a foreign national in Silesian. The fact that the certificates did not come into the hands of the Custodian is immaterial. They are

* Compare with the statement below: "The power of Congress to seize and confiscate enemy property rests upon Art. I, § 8, Clause 11 of the Constitution. Stoehr v. Wallace, supra, page 242; United States v. Chemical Foundation, Inc., 272 U. S. 1, 11. Whether it exists at international law may be doubted; but nobody contends that the war power of Congress includes the seizure of the property of friendly aliens. The amendment of § 5(b) must therefore rest upon some other power of Congress, not only for that reason, but because the amendment itself was expressly not limited to time of war (although it was in fact passed flagrante bello) but was to go into effect upon any 'national emergency declared.' It can rest upon Art. 1, § 8, Clause 1: i. e. upon the power 'to provide for the common Defence and general Welfare'; indeed, so far as we can see, the debtor does not challenge the power itself, but its exercise. It complains that the amendment delegates an unrestricted discretion to the President, and does not provide 'just compensation' for seizures." 156 F. 2d 793, 796.

evidences of the property right of the foreign national in Silesian that is subject to be vested in the Custodian by the Act. See *Great Northern R. Co. v. Sutherland*, 273 U. S. 182. Section 5 (b) (1) (B) specifically states, "and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes." See note 2 above. Since the Custodian was authorized to vest and to sell the property by § 5, we think that the power to require the issue of new certificates was incidental to that authority. As one purpose of § 5 (b) (1) (B) was to authorize the seizure of the interests of foreign nationals in domestic corporations so that such interest could be used or sold, such authority to participate in management or to transfer the stock interests would be frustrated if customary evidences of the ownership could not be required from the corporation. The power of the Custodian to demand the certificates is plain. The correlative duty to obey the order equally so, if the effect of obedience does not do violence to other valid requirements of the statute or make Silesian liable to bona fide holders of the old stock.

Silesian in specific terms is protected from any liability to bona fide holders such as Non Ferrum or the Swiss Banks by reason of any infirmity in the Custodian's vesting order or his direction to Silesian to issue new certificates for the Non Ferrum stock. The applicable language of § 7 (e) of the Trading with the Enemy Act, 40 Stat. 418, and § 5 (b) (2), as amended, 55 Stat. 839–40, are set out in the margin.[5] But Silesian argues that pro-

[5] 40 Stat. 418, § 7 (e):

"No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this Act."

55 Stat. 840, § 5 (b) (2):

"Any payment, conveyance, transfer, assignment, or delivery of property or interest therein, made to or for the account of the United States, or as otherwise directed, pursuant to this subdivision or any

tection cannot follow from an order contrary to the Trading with the Enemy Act. The order to issue the new certificates is said to be unauthorized because it allows the property of friendly alien pledgees, the Swiss Banks, to be taken contrary to § 8 (a).[6] Section 8 (a) is said to be a limitation on the Custodian's power to seize property pledged to "any person not an enemy or ally of enemy." It is suggested that if § 7 (e) or § 5 (b) (2) is interpreted to require Silesian to carry out the Custodian's direction, even though this seizure is contrary to § 8 (a), a way has been found to "coerce an interested party [Silesian] into compliance with his [the Custodian's] unlawful actions." The answer to this contention is made by the Circuit Court of Appeals. It makes unnecessary any discussion of the protection afforded Silesian by § 7 (e) and § 5 (b) (2) from the claims of a pledge of stock exempted by statute from seizure. 156 F. 2d at 797. When § 5 (b) (1) (B) was enacted as an amendment in the First War Powers Act of 1941, it authorized the taking

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rule, regulation, instruction, or direction issued hereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same; and no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

[6] 40 Stat. 418–19, § 8 (a):

"That any person not an enemy or ally of enemy holding a lawful mortgage, pledge, or lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such mortgage, pledge, or lien, or right, may be disposed of on notice or presentation or demand . . . may continue to hold said property, and, after default, may dispose of the property . . . *Provided further*, That if, on any such disposition of property, a surplus shall remain after the satisfaction of the mortgage, pledge, lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order."

of any property or interest therein of any foreign national. This broadening of the scope of the Custodian's power to vest so as to include interests of friendly aliens in property includes the power to vest the interest which friendly aliens have from pledges. As the Circuit Court of Appeals said, p. 797:

> "Any other interpretation of the section would make the pledges of friendly aliens a wholly irrational exception to the general purpose to subject all alien interests to seizure."

Therefore, as we hold that § 5 (b) (1) (B) rendered § 8 (a) inapplicable to the property of friendly aliens, the order of the Custodian was valid and Silesian's objection disappears.

Finally there is the argument that Silesian cannot be compelled to issue the new certificates because the friendly aliens who claim interests in the Non Ferrum stock may not succeed in recovering the just compensation for the taking. See *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 489.[1] The Constitution guarantees to friendly aliens the right to just compensation for the requisitioning of their property by the United States. *Russian Fleet* v. *United States, supra.* We must assume that the United States will meet its obligations under the Constitution. Consequently, friendly aliens will be compensated for any property taken and Silesian is protected by the exculpatory clauses of the Act from any claim from its alien stockholders.

Judgment affirmed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

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[1] The Circuit Court of Appeals said: "Thus, it can be argued with much force that, unless some provision can be found by which he may secure compensation, § 5(b) is unconstitutional; and, if so, it would at best be doubtful whether the protection given by subsection (2) would be valid." 156 F. 2d 793, 797.